SUPREME COURT U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

CREST FINANCE CO., INC., *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The petitioner, Crest Finance Co., Inc., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The United States District Court for the Northern District of Illinois rendered no opinion in this case. Its findings of fact and conclusions of law (R. 20-31)[1] are not officially reported. The opinion of the Court

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[1] "R." refers to the Appendix to appellant's brief in the Court of Appeals. "Appendix" references are to the appendices to this petition.

of Appeals (Appendix A, *infra*, pp. 1a-8a) is reported at 291 F. 2d 1 .

JURISDICTION

The judgment of the Court of Appeals was entered on May 16, 1961. (Appendix A, *infra*, p. 8a.) A petition for rehearing was timely filed on May 25, 1961, and was denied on June 15, 1961 (Appendix A, *infra*, p. 9a). The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether assignments to petitioner of existing accounts receivable for work already performed by the assignor, which assignments secured present loans of money by petitioner to the assignor, are superior to federal tax liens which both arose and were filed after the dates of the loans and assignments.

STATUTES AND REGULATIONS INVOLVED

Sections 6321, 6322, and the pertinent part of Section 6323(a) of the Internal Revenue Code of 1954, Section 301.6323-1(a)(2)(ii) of the Treasury Regulations on Procedure and Administration, and Section 22(1) of Chapter 110 and Sections 220 and 221 of Chapter 121½ of the Illinois Revised Statutes are set forth in Appendix B, *infra*, pp. 9a-13a.

STATEMENT

The facts, all of which were stipulated (R. 4-19), may be summarized as follows:

Standard-Crowley-Jackson (hereinafter called "Standard"), a joint venture, was the principal contractor with the Illinois State Highway Commission

for the construction of a portion of the Illinois Toll Road. On September 20, 1957, Twin Excavating Co., Inc. (hereinafter called "the taxpayer") entered into a subcontract with Standard for hauling and compacting excavated dirt. Standard agreed to make payment to the taxpayer for performance of its work in a sum based upon estimates only, in accordance with weekly invoices or reports of the number of loads carried to the site of construction. The weekly invoices or reports contained the statement, "The above total is subject to revision as to exact quantity by cross section, by Section Engineer." (R. 25.)

From March 21, 1958 through June 10, 1958, the petitioner, Crest Finance Co., Inc., made nine loans to the taxpayer totaling $67,722.53. Each loan was evidenced by the taxpayer's note, secured by a concurrent written assignment of the accounts receivable reflected in specific weekly invoices due from Standard to the taxpayer in the aggregate amount of $124,739.29, for work performed prior to the respective assignments. (R. 26.) The documents executed by the taxpayer recited that it "hereby sells, assigns and transfers to Crest Finance Co., Inc., [petitioner] * * * all the right, title and interest" of the taxpayer in such accounts. The taxpayer warranted to petitioner, among other things, that "the moneys due or to become due on said accounts are truly set forth in the schedule * * *," and that "ful deliveries have been made in accordance with the specification of the buyer, as per invoice or invoices and evidence of delivery tendered herewith". It further warranted that "there is no contra account or offset against any or either of them and that none of them have been heretofore encumbered, pledged, sold, assigned or otherwise hypoth-

ecated", and that "entries have been made on the books of the undersigned [taxpayer] disclosing the sale and/or assignment of said accounts". (R. 14-15.)

The taxpayer gave petitioner "full power and authority * * * to notify any and all parties liable on the said accounts above described of the transfer and assignment thereof". Taxpayer agreed that if any payments thereof came into its possession, they would "be immediately delivered on the day of receipt thereof, to the Company [petitioner] in the original form in which the same may be received, it being understood and agreed that the undersigned [taxpayer] shall have no right, title or interest in and to said remittances and that the same shall be the separate and exclusive property of the Company [petitioner] until all obligations of the undersigned [taxpayer] to the Company, due or to become due, shall have been fully paid". (R. 16.) Petitioner's agent was granted power of attorney to "sell, assign, transfer, receive payment of or on account of, collect, sue for, recover, compromise, settle, receive for and/or discharge, in the name of the Company [petitioner] or in the name of the undersigned [taxpayer]," any of the assigned accounts. (R. 17.)

Illinois law does not require or provide for any filing or recording of assignments of accounts receivable (Appendix A, *infra*, p. 3a), and hence the assignments were not recorded (R. 26). Illinois law deems such an assignment fully perfected against all persons by the written assignment alone, even without notification to the debtor. Ill. Rev. Stat. Ch. 121 ½, § 221 (Appendix B, *infra*, pp. 12a-13a). However, Standard was notified of the assignments, and in fact paid direct to petitioner the sums of $44,316.59 on May 9, 1958 and $20,000 on July 24, 1958. Of the May 9, 1958 payment,

petitioner retained $30,000 in full payment of the then outstanding amount of its loan and interest, and remitted the rest to the taxpayer. The entire $20,000 received on July 24, 1958 was applied by petitioner on outstanding balances, leaving something over $17,000 still payable, with interest thereon. (R. 26-27.)

Federal taxes totaling $22,643.94 were assessed against the taxpayer on dates ranging from August 15, 1958 to November 14, 1958. Notices of lien were filed from September 10, 1958 to January 20, 1959. (R. 22-24.) The last assignment of accounts receivable to petitioner, and the last loan by petitioner to the taxpayer, were made more than two months before the first assessment of taxes and three months before the filing of the first notice of tax lien.

Following levy upon it by the tax collector, Standard commenced an action of interpleader against the petitioner, the taxpayer, the United States, and others. Standard paid $17,369.94 into court. The District Court dismissed the United States as a party defendant, and granted it leave to file a complaint in intervention. The District Court awarded first priority to the claims of two equipment lessors (aggregating $4,816.44), the priority of which claims is not involved in the present petition for certiorari. The court awarded the balance of the fund ($12,553.50) to the United States, in preference to petitioner's rights under its prior assignments. (R. 31-32.) The Court of Appeals affirmed. (Appendix A, *infra*, pp. 1a-7a.)

BASIS FOR FEDERAL JURISDICTION IN THE LOWER COURTS

This action was commenced as an action of interpleader under section 1335 of Title 28, U. S. Code, federal jurisdiction being based upon an amount in controversy exceeding $500 and diversity of citizenship among the adverse claimants. (R. 20-21.)

After the United States was dismissed as a defendant, for lack of consent to be sued in interpleader, the United States intervened as plaintiff pursuant to sections 7401, 7402 and 7403 of the Internal Revenue Code of 1954 and Section 1345 of Title 28, U. S. Code.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals is in conflict with the decisions in *In re Halprin,* 280 F. 2d 407 (3d Cir. 1960), and *City of New York* v. *United States,* 283 F. 2d 829 (2d Cir. 1960).

2. The Court of Appeals has erroneously decided an important question of federal law, vitally affecting the entire finance industry. The question can be settled only by this Court, since it involves the resolution of conflicting interpretations of the brief *per curiam* decision of this Court in *United States* v. *Ball Construction Co.,* 355 U.S. 587 (1958). Lower courts, vainly attempting to construe the *Ball* decision by reference to the dissenting opinion, have extended the decision far beyond the facts of that case, and have applied to security assignments, in the words of the court below, "a standard of choateness that few competing non-federal liens can achieve, short of judgment"—surely a result never intended by this Court.

1. The Decision of the Court of Appeals is in Conflict With Decisions of the Second and Third Circuits

The federal taxes here involved became liens, as of the dates of their assessment, upon "all property and rights to property, whether real or personal, belonging to" the taxpayer. Int. Rev. Code of 1954, §§ 6321 and 6322 (Appendix B, *infra*, pp. 9a-10a). The liens could not attach to anything which, under state rules of property, did not *belong to* the taxpayer on (or after) the assessment dates. *United States* v. *Durham Lumber Co.*, 363 U.S. 522 (1960); *Aquilino* v. *United States*, 363 U.S. 509 (1960); *United States* v. *Bess*, 357 U.S. 51 (1958). Furthermore, the federal tax liens are inferior to earlier *liens* on the taxpayer's property, under the principle that "the first in time is the first in right", provided only that such other liens became "choate" before the federal taxes were assessed and became liens. *United States* v. *City of New Britain*, 347 U.S. 81 (1954); *United States* v. *Toys of the World Club, Inc.*, 288 F. 2d 89, 92 (2d Cir. 1961).[2]

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[2] The respondent argued below that petitioner was not a "mortgagee" or "pledgee" within the meaning of Internal Revenue Code of 1954, § 6323(a) (Appendix B, *infra*, p. 10a). This is a false issue in the case, however. Status as a mortgagee or pledgee is necessary under § 6323(a), to protect a lender against federal tax liens *which have already arisen but are unfiled* at the time the lender acquires his interest. If the federal tax liens have not then even come into existence (by assessment), § 6323(a) does not enter the case, and it is enough if the lender has either a property interest or a choate lien, whether or not it is technically a "mortgage" or a "pledge". The contrary view suggested in Mr. Justice Jackson's concurring opinion in *United States* v. *Security Trust & Savings Bank*, 340 U.S. 47, 51 (1950), has not been adopted by this Court, as the *New Britain* case, *supra*, shows. See *United States* v. *Toys of the World, Inc.*, *supra*, at 92, n. 1.

The court below, therefore, properly declined to decide whether an assignee of accounts receivable to secure a debt might be a "pledgee" under § 6323(a). See Appendix A, *infra*, p. 4a. If

The court below held that the assignments of accounts receivable to petitioner, as security for present loans of money, gave rise merely to *inchoate liens* on the accounts. In so holding, the court purported to follow this Court's *per curiam* decision in *United States* v. *Ball Construction Co.*, 355 U.S. 587 (1958). However, the decision below is in conflict with decisions of the Second and Third Circuits, both decided subsequent to the *Ball* case.

The Second Circuit case of *City of New York* v. *United States*, 283 F. 2d 829 (2d Cir. 1960), holds that an assignment for the benefit of creditors passes title to the assignee, and that all the assignor owns thereafter, to which a later federal tax lien can attach, "is the right to have refunded to him whatever remains after the creditors have been satisfied" (pp. 831-832). Equally, in the present case, the taxpayer had assigned title to the accounts to petitioner to secure debts, and thereafter (in the words of this Court in *United States* v. *Durham Lumber Co.*, 363 U.S. 522, 525 (1960)), "possessed merely a right to the residue of the fund". The conclusion of the court below, that the taxpayer continued to "own" the entire property in the accounts, subject only to an inchoate lien in the security assignee, is squarely contrary to the principle stated in the Second Circuit's decision in *City of New York* v. *United States, supra.*

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it is thought material, we submit that a fair, reasonable and non-technical reading of § 6323(a) (as directed by Congress in Sen. Rep. No. 1622, 83d Cong., 2d Sess. 575 [Appendix C, *infra*, p. 17a], and by the Treasury in § 301.6323-1(a)(2)(ii) of its Regulations [Appendix B, *infra*, p. 10a]) would include any transfer of title (as in this case) or possession of property to secure a debt, whether the property is realty, chattels, or intangibles. Cf. *Gauvey* v. *United States*, 211 F. 2d 42 (8th Cir. 1961).

The Third Circuit case of *In re Halprin*, 280 F. 2d 407 (3d Cir. 1960), parallels the present case in its essential facts. The taxpayer there had contracted to sew and complete garments for a manufacturer. Needing funds to meet payrolls, he borrowed on the security of an assignment of the money to be earned under the contract. Notice of the assignment was given to the manufacturer, who consented to the assignment and agreed to pay the lender all money to come due under the contract. There was already a federal tax lien on file when the loan and assignment were made, and the Government claimed that such lien had attached to the contract ahead of the assignment.

The Third Circuit held that, prior to his performance of the executory contract, the taxpayer had no property right in the proceeds ("belonging to" him), to which the existing federal tax lien could have attached, under Internal Revenue Code § 6321 (Appendix B, *infra*, p. 9a). The court further held that, when the manufacturer's unqualified promise to pay subsequently came into existence, it did not belong to the taxpayer but to the lender, and it could not be reached by any lien on the taxpayer's property. The Government was "relegated to the borrowing taxpayer's net after the lender is reimbursed". (280 F. 2d at 410.)

The present case differs in that here the assigned obligations had been earned before the assignment and did not relate to work yet to be performed. Thus, unlike the *Halprin* case, the accounts had become property "belonging to" the taxpayer. That is an immaterial distinction, however. *Before the federal tax liens ever arose*, the present taxpayer had assigned its rights to the petitioner—an act which was as effective in divesting the taxpayer of its property as Halprin's as-

signment was effective to prevent his acquiring a property right in the contract payments. Petitioner, as assignee, had a direct right of action against the taxpayer's debtor, both under the express terms of the loan contract (R. 17) and under state law, Ill. Rev. Stat. Ch. 110, § 22(1) (Appendix B, *infra*, p. 11a). The account debtor, having notice of the assignment, could not have discharged its liability by paying the taxpayer. *Chicago Title & Trust Co.* v. *Smith*, 158 Ill. 417, 41 N.E. 1076, 1078 (1895); 3 Williston on Contracts § 433, p. 210 (3d ed. 1960).[3]

In this case as in *Halprin*, at the time the federal tax liens might have attached to the accounts, the secured lender had already obtained a direct right of action against the account debtor, and the taxpayer "possessed merely a right to the residue of the fund" (*United States* v. *Durham Lumber Co.*, 363 U.S. 522, 525 (1960)). In holding that, in such circumstances, a federal tax lien could attach to the exclusion of the lender's existing rights, the decision below is in clear and direct conflict with the Third Circuit's decision in *Halprin*.

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[3] Respondent, in its brief below, argued (without support in the record) that petitioner did not "police" nor have or exercise any control over the assigned accounts, such as was exercised by the lender in *In re New Haven Clock & Watch Co.*, 253 F. 2d 577 (2d Cir. 1958), and such as was there held to meet the requirements of *Benedict* v. *Ratner*, 268 U.S. 353 (1925). Respondent misconceives the rule of those cases. They dealt with so-called "non-notification" financing, in which the debtors are not notified of the assignment of their accounts, and the assignor is allowed to collect the accounts for the benefit of the lender. In such a case, the lender must "police" the collection of the accounts, lest the assignor exercise such dominion over them that the lien is lost. In the present case, the account debtor (Standard) had notice of the assignment; petitioner as assignee had the exclusive right to enforce collection. Collections were in fact made by petitioner. (R. 16-17, 26-27.)

2. The Court of Appeals Has Erroneously Decided an Important Question of Federal Law Which Can Be Settled Only By This Court

In concluding that the assignee of accounts receivable as security for present loans has only an "inchoate lien", vulnerable even to federal tax liens that did not exist when the assignment was made, the court below purported to apply this Court's decision in *United States* v. *Ball Construction Co.*, 355 U.S. 587 (1958). With respect to that decision the court below said (Appendix A, *infra*, p. 5a):

> "It is to be regretted that in deciding a question that would, necessarily, often be considered by the bench and bar, the reasons given by the majority for its decision were confined to less than three lines. The language used was: 'The instrument involved being inchoate and unperfected, the provisions of § 3672(a), Revenue Act of 1939, 53 Stat. 449, as amended, 53 Stat. 882, 56 Stat. 957, do not apply.' Fortunately, the four Justices who dissented give us some insight as to the basis of the majority opinion."

It is doubly to be regretted that the majority of this Court failed to elaborate its reasons, since the efforts of some lower courts to construe the decision by reference to the dissent, upon the improbable premise that every statement made by the minority was disagreed with by the majority, have extended the *Ball* decision far beyond the facts of the case. The decision below, and others on which it relied,[4] have applied to security as-

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[4] *United States* v. *Chapman*, 281 F. 2d 862 (10th Cir. 1960); *First State Bank of Medford* v. *United States*, 166 F. Supp. 204 (D. Minn. 1958); *Arthur Company* v. *Chicago Paints, Inc.*, 175 F. Supp. 50 (D. Minn. 1959). See also *Randall* v. *Colby*, 190 F. Supp. 319 (N. D. Iowa 1961), which was not cited below.

signments (in the words of the court below) "a standard of choateness that few competing non-federal liens can achieve, short of judgment" (Appendix A, *infra*, p. 5a).

The court below did not articulate its reasoning, beyond stating the facts and holdings of the decisions relied upon (note 4, *supra*) and rejecting certain distinctions which had been urged upon the court. It is necessary, therefore, to refer to those other decisions to ascertain the features of the present security assignments which might have led the court to deem them inchoate. Those decisions indicate that such features are (1) that no action had been taken to enforce the security, and (2) that the secured debt had not been paid![5] In *First State Bank of Medford* v. *United States*, 166 F. Supp. 204, 209 (D. Minn. 1958), the court declared that "A lien interest, in and of itself, is indefinite. Contingency is the very basis of liens—if an obligor fails upon a primary obligation, the lien-hold interest, though already in existence, becomes the basis of an enforcible right." In *United States* v. *Chapman*, 281 F. 2d 862, 869 (10th Cir. 1960), approving *Medford*, the Tenth Circuit declared that the security assignee was a mere "lienor," and that "the amount of the debt to be collected from the security had not been determined", as evidenced by the fact that there had been payments drawing down the amount of the lien.

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[5] In the *Medford* case, *supra* note 4, at 209, the court recited that the Government admitted that "the Bank may have obtained a perfected right to the payments it received • • • but this is not true of the unpaid fund here in suit".

The practical effect of those decisions is that no security transaction whatever will have any effectiveness against a federal tax lien. Every mortgage or other security transaction is "inchoate" in the sense that it requires some act to enforce it,[6] and that it cannot be known until default (if then) to what extent the debt will be satisfied without resort to the liened property.[7] A security that affords no protection until it is enforced is no security at all; the lender stands in exactly the same position, as against federal tax liens, as an unsecured creditor. The very purpose of taking security for a debt is to afford the lender protection against adverse interests arising before the time comes for enforcement.

Whatever appropriateness such a standard of choateness might have as against statutory liens (see notes 6 and 7, *supra*), its application by the lower courts to contractual security transactions is startling evidence of the Pandora's box that was opened by the *per curiam* decision in *Ball*. The result reached by the court below is utterly inconsistent with the purpose of Congress, as expressed in § 6323(a) of the Internal

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[6] In this sense, the present assignment, enforceable without court action by simply collecting the assigned accounts, is more choate than many real estate mortgages, which "could not be enforced without the assistance of the courts". *Cf. United States* v. *Texas*, 314 U.S. 480, 487-488 (1941).

[7] *United States* v. *Chapman*, 281 F. 2d 862, 869 (10th Cir. 1960). *Cf. United States* v. *Scovil*, 348 U.S. 218, 220 (1955). But *cf. United States* v. *City of New Britain*, 347 U.S. 81 (1954), granting priority to statutory liens for real estate taxes and water rents, arising before the federal tax assessments, even though such liens might well have been satisfied without resort to the liened property. See extended analysis in "Applicability of the 'General and Unperfected Lien' Doctrine to Contractual Liens", 43 Minnesota L. Rev. 755 (March 1959).

Revenue Code of 1954 (Appendix B, *infra*, p. 10a), and its predecessors, "to facilitate business transactions" by relieving secured lenders of the risk of subordination even to *existing* but undisclosed tax liabilities of the borrower. H. Rep. No. 1018, 62d Cong., 2d Sess. (1912) (Appendix C, *infra*, pp. 14a-16a). The decision below would subject the second lender not only to existing undisclosed liens but even to liens for federal taxes that *had not been assessed* when the security was taken.[8]

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[8] It is unclear from the *Ball* decision whether this would be true even in the case of real estate and chattel mortgages, or would be limited to security transactions involving accounts receivable, contract proceeds and other intangibles. The four dissenting Justices in *Ball*, approving the conclusion of the lower courts (*Ball Construction Co.* v. *Jacobs*, 140 F. Supp. 60 (W.D. Tex. 1956), *aff'd*, 239 F. 2d 384 (5th Cir. 1956)), declared that "the 'assignment' was in legal effect a 'mortgage'." Certain district courts, attempting to construe the *Ball* decision in the light of the dissent, and apparently assuming that the majority necessarily rejected every contention stated by the minority, have concluded that the majority opinion must mean that an assignment of an account to secure a debt is *not* a "mortgage" within the meaning of § 6323( ) 1 its predecessor. *Arthur Company* v. *Chicago Paints, Inc.*, F. Supp. 50, 53 (D. Minn. 1959); *Randall* v. *Colby*, 190 F. Supp. 319, 339-340 (N. D. Iowa 1961). See also the dissent of Judge Haynsworth in *United States* v. *Bond*, 279 F. 2d 837, 850 (4th Cir. 1960), *certiorari denied*, 364 U.S. 895 (1960). On the other hand, the majority of the Fourth Circuit, in the *Bond* case, *supra*, at p. 845, viewed the *Ball* decision as turning, not upon the failure of the instrument to qualify as a "mortgage", but upon the application of the "inchoate lien" standard to contractual liens, including even real estate mortgages. See also *First State Bank of Medford* v. *United States*, 166 F. Supp. 204, 208 (D. Minn. 1958); *United States* v. *Ringler*, 166 F. Supp. 544, 547 (N. D. Ohio 1958). *Cf. Gauvey* v. *United States*, 291 F. 2d 42, 47 (8th Cir. 1961). No court has yet gone so far as to hold inchoate a real estate or chattel mortgage securing a *present* loan of money, antedating the federal tax lien, but even that possibility exists as a result of uncertainty as to the precise reason why the security interest in *Ball* was subordinated to the later federal tax lien.

In the *Chapman* case, *supra*, which was followed by the court below, the Tenth Circuit recognized the adverse effect of its decision on "a common, legitimate commercial transaction", but declared that the majority of this Court, in *Ball*, must have considered such problems, since "the dissent takes pains to point out these matters". (281 F. 2d at 870.) Due respect for this Court compels the conclusion, however, that in summarily disposing of *Ball* this Court did not intend the consequences which result from its subsequent extensions by the lower courts. It is more reasonable to suppose that some peculiarity in the facts of *Ball* persuaded this Court to declare that "the instrument involved [was] inchoate and unperfected", and that it was never intended in that fashion to render *all* security interests (or even all assignments for security) automatically subordinate to after-arising federal tax liens.

The *Ball* case involved an assignment of amounts to be earned under a subcontract, to indemnify a surety against liability on the subcontractor's bond on that job, as well as to secure "the payment of any other indebtedness or liability of the [subcontractor to the surety], whether [t]heretofore or [t]hereafter incurred * * *". This Court granted priority, in such contract proceeds, to federal tax liens which were filed after the assignment and after the work was completed, but before the surety made good the assignor's default on another job, for which the surety claimed indemnity. The four dissenting Justices mentioned three features of the transaction, none of which they considered sufficient to invalidate the assignment as against later federal tax liens, but any one or more of which might have

persuaded the majority to the contrary. Those features were: (1) the "fact that the assignment was of property to be afterwards acquired"; (2) the "uncertainty in the amount" of "sufficiently identified but contingent and unliquidated obligations" secured by the assignment; and (3) "the fact that the instrument was not recorded under the State's fraudulent conveyance statutes—thus to impart constructive notice to subsequent purchasers, mortgagees and the like." (355 U.S. at 593-594.)

The difficulty with having to construe a decision by reference to the dissenting opinion is that it is impossible to know which of the points made by the dissenting Justices failed to persuade the majority. The majority (or at least one of the five) might have agreed with the four dissenting Justices on every point but one, yet the crucial point of disagreement cannot be identified by reading the dissenting opinion. Significantly, however, *none* of the possibly adverse features discussed in the *Ball* dissent, and enumerated above, exists in the present case. Those features will be discussed in turn:

(1) In the present case, the property subject to the security assignment was not property to be acquired or earned in the future, but consisted of presently existing and clearly identified claims for work done in specified past periods. (R. 26.) True, the assigned invoices were subject to audit and verification (R. 25-26), in the same way that all account debtors have the right to check their bills for mathematical errors, mistakes, counterclaims and other adjustments. That right of the account debtor does not impair the identification of the assigned account, or alter its character as a

present claim for money already earned by work already done.[9]

(2) The *amount* of petitioner's lien was certain, and subject to no contingency. The lien secured the repayment of present loans of fixed amounts of money, evidenced by promissory notes. The fact that the amount of the lien declines as payments are made (although deemed significant in *First State Bank of Medford* v. *United States, supra,* at 209; *United States* v. *Chapman, supra,* at 869) is inherent in every mortgage or security transaction, and cannot, consistently with § 6323(a) of the Internal Revenue Code (Appendix B, *infra,* p. 10a), be deemed to make the lender's interest inchoate. The right of the account debtor to verify the assigned invoices bears on the realizable value of the *collateral* (above discussed), and does not in any way affect the *amount of the lien* thereon.

(3) Petitioner, unlike the surety in *Ball,* did everything that state law required in order to make the assignments valid and perfected not only against the assignor but against possible subsequent assignees of the same accounts.[10] The lower courts, since the *Ball*

[9] Since the court below did not even refer in its opinion to the stipulated fact that the assigned accounts were subject to verification, it is fair to assume that this was not the basis on which the court found the assignments themselves inchoate.

[10] Ill. Rev. Stat. Ch. 121½, § 221 (Appendix B, *infra,* pp. 12a-13a) (a statute which has been in effect since 1943, long before the *Ball* decision). There is, it is true, a reference in the opinion below to the fact that "The only thing that was not done, and which the Government contends made all the other actions futile, was the transfer of the pieces of paper that represented the accounts." (Appendix A, *infra,* p. 4a.) Assuming that such contention of the Government were supported by the record (but *cf.* R. 15, where the instrument of assignment refers to "invoice or invoices

decision, have divided on whether a security transaction, valid between the parties, is rendered inchoate by the mere fact that the creditor's failure to record the instrument left the taxpayer with power to pass a good title to third parties. Compare *Allan* v. *Diamond T. Motor Car Co.*, 291 F. 2d 115 (10th Cir. 1961) (unrecorded conditional vendor's interest held inchoate), with *Gauvey* v. *United States*, 291 F. 2d 42 (8th Cir. 1961); and *United States* v. *Eagle*, . . . F. Supp. . . . , 4 A.F.T.R. 2d 5351, 59-2 U.S.T.C. ¶ 9656 (E.D.S.C. 1959) (recording pursuant to state law held unnecessary to choateness). Illinois law, however, *does not provide for or require* recording of assignments of accounts receivable, in order to make them effective against third parties.[11] Therefore, whether or not *Ball* is deemed to

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and evidence of delivery tendered herewith"), that contention was not addressed to or considered on the issue of choateness, but was addressed to the question whether petitioner had sufficient possession to be considered a "pledgee"—on which the court did not pass. In any event, the invoices were not specialties, or negotiable instruments, or even the kind of non-negotiable notes or warrants which in some cases may be held to so represent the debt that "possession" of the debt may be transferred by delivery of the symbol. See 3 Williston on Contracts (3d ed. 1959) § 439. In the case of simple contract debts, possession of the bill or invoice is of no legal significance, and it is the formal written assignment that fills the role of the delivery which is an essential part of the pledge. *Immel* v. *Travelers Insurance Co.*, 373 Ill. 256, 260, 26 N.E. 2d 114, 116 (1940); *Crump* v. *Hill*, 105 F. 2d 124, 126 (5th Cir. 1939). See *Schwartz* v. *Horowitz*, 131 F. 2d 506, 508 (2d Cir. 1942).

[11] The respondent argued below that such assignments are required to be recorded as chattel mortgages. But the Court of Appeals, which is in the best position to ascertain the laws of States within its jurisdiction (*United States* v. *Durham Lumber Co.*, 363 U.S. 522, 527 (1960); *Helvering* v. *Stuart*, 317 U.S. 154, 164 (1942); *Estate of Spiegel* v. *Comm'r.*, 335 U.S. 701, 708 (1949)), determined that "Under Illinois statutes, no filing or recording is required to perfect an assignment of accounts receivable." (Appendix A, *infra*, p. 3a.)

have turned on non-recording of the assignment, that fact can have no relevance here. Federal law, which provides no facilities for recording of private assignments, can hardly be thought to impose a requirement of recording when state law provides none.

Thus, unless all security transactions are to be regarded as inherently and incurably inchoate, there is no fact present in this case which could make the assignments to petitioner ineffective against subsequently arising federal tax liens. These assignments, as above demonstrated, met every requirement for choateness prescribed in *United States* v. *City of New Britain*, 347 U.S. 81, 84 (1954), where this Court declared that a lien may be "perfected in the sense that there is nothing more to be done to have a choate lien—when the identity of the lienor, the property subject to the lien, and the amount of the lien are established". When so perfected, said this Court, the lien's priority as against a federal tax lien is determined by the principle that "the first in time is the first in right". The three factual features discussed in the dissent in *Ball*, or some of them, were presumably deemed by the majority to have caused the assignment in *Ball* to fail the tests of identification of the property or certainty of the amount; thus *Ball* itself may be reconcilable with *New Britain*, which the majority in *Ball* cited and relied upon. But the decision below, and those upon which it relies, cannot be reconciled with the standards set out by this Court in *New Britain*.

Two Courts of Appeals and at least two District Courts (*supra*, note 4), whose jurisdictions cover eleven large States of the Union, have so applied the *Ball* decision that no assignment of obligations to secure a debt can ever be considered choate and per-

fected as against subsequent federal tax liens. The effects of these decisions are far-reaching and potentially catastrophic. Billions of dollars annually are loaned to business on the security of accounts receivable for goods sold and services performed. Contractors on the multi-billion dollar federal programs for highway, school and housing construction will require extensive financing. If such businessmen and contractors cannot give security which is proof against after-arising federal tax liens (one of the largest liabilities to which business may be subject), the cost of financing them will inevitably rise, and the more marginal ones will not be able to get financing at all.[12] The lender cannot protect itself by a search of the records of federal tax liens, or even by examining the borrower's books for evidence of unpaid tax liabilities; for a number of these decisions, including the decision below, award priority even to federal tax liabilities that come into existence after the loan is made and the security is acquired.[13] "The result of such extension of the tax collector's reach is likely to be the destruction of the earning power, and with it the taxpaying power of the burdened business." *In re Halprin,* 280 F. 2d 407, 410 (3d Cir. 1960).

In a matter having so far-reaching an effect upon the business life of the Nation, it should not be necessary for the courts longer to speculate on what this

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[12] See "Applicability of the 'General and Unperfected Lien' Doctrine to Contractual Liens", 43 Minnesota Law Review 755, 774 (March 1959); Myers, "The Fall and Rise of the Security Interest", 6 Practical Lawyer 60, 62-64 (December 1960).

[13] If, as some decisions suggest, the same tests apply to real estate mortgages (*supra,* note 8), lenders of many more billions of dollars may be vulnerable to liens for federal taxes imposed decades after they acquired their security interests.

Court had in mind in *Ball*. Petitioner submits, therefore, that—irrespective of the conflict of decisions above described—this case involves "an important question of federal law that has not been, but should be, settled by this Court."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari in this case should be granted.

Respectfully submitted,

EDMUND L. JONES
SEYMOUR S. MINTZ
WILLIAM T. PLUMB, JR.
HAMILTON CLORFENE

Attorneys for Petitioner

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 13226 September Term 1960—April Session 1961

UNITED STATES OF AMERICA, *Plaintiff in Intervention-Appellee,*

v.

CREST FINANCE CO., INC., *Defendant-Appellant.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

May 16, 1961

Before DUFFY, KNOCH and CASTLE, *Circuit Judges.*

DUFFY, *Circuit Judge.* On January 5, 1959, Standard-Crowley-Jackson (Standard) filed this action for interpleader against Crest Finance Co., Inc. (Crest), the United States and others. Thereafter, Standard paid $17,369.94 into the registry of the United States District Court for the Northern District of Illinois, subject to the decision of the Court as to which defendant or defendants shall recover. An order was thereafter entered dismissing the United States as party defendant, and granting the United States (Government) leave to file a complaint in intervention. On April 20, 1959, plaintiff filed an amended complaint making Road Machinery and Supplies Company (Road Machinery) and Peter Kiewit Sons' Company (Peter Kiewit) additional parties defendant.

Standard was the principal contractor for the construction of a portion of the Illinois Toll Road. On September 20, 1957, Standard and Twin Excavating Co., Inc., entered into a contract pursuant to which the latter furnished certain labor and materials for the road construction.

From March 21, 1958 through June 10, 1958, Crest made loans to Twin Excavating Co., Inc. which were secured by promissory notes and by assignments of accounts receivable of Twin Excavating Co., Inc. Each note provided that the accounts were pledged as security. The loans during this period totaled $67,722.53.

The District Director of Internal Revenue assessed federal withholding and social security taxes against Twin Excavating Co., Inc. with respect to wages paid to employees for services rendered between April 1, 1958 and September 30, 1958. The dates of the assessments were August 15, November 7 and November 14, 1958. Notices of the federal tax liens for said assessments were duly filed. On October 9, 1958, a notice of levy was served upon Standard by the United States. It was admitted by Standard that it owed Twin Excavating Co., Inc. the sum of $17,369.94, and it was this amount that Standard paid into court.

The Government admits that the claims of Road Machinery and Peter Kiewit have priority over its claims, but insists that it is entitled to the balance of the fund. Crest contends its liens which came into existence during the period March 1, 1958 through June 10, 1958, are prior and superior to all other claimed lien rights. Road Machinery and Peter Kiewit urge they are subcontractors who have perfected their liens under Illinois law and as such, have liens superior to the assignee of the contractor and superior also to the tax liens of the United States.

The Revenue Act of 1928, § 613(b), 45 Stat. 875, provided that a government tax lien shall not be valid against any "mortgagee, purchaser, or judgment creditor until notice thereof has been filed. . . ." This was amended in 1939 to include "pledgee." Revenue Act of 1939, § 3672(a), 53 Stat. 882. Section 6323(a) of the Internal Revenue Code of 1954, 26 U.S.C. § 6323(a) now in effect, has taken the place of section 3672(a) of the 1939 Code, and pro-

vides, "Except as otherwise provided in subsection (c), the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate. . . ."

Under Illinois statutes, no filing or recording is required to perfect an assignment of accounts receivable. Ill. Rev. Stat. 1959, ch. 121½, § 221. Crest argues its liens were choate prior to the filing of the federal liens in that it was clearly established that Crest was the lienor, that specific accounts receivable were subject to the lien, and that the amount of the lien was fixed. Crest cites *United States* v. *City of New Britain*, 347 U.S. 81.

The Government argues that what is a choate lien for this purpose is a question of federal law so that the characterization of a lien as choate under state law is not controlling; that the relative priority of a federal lien for unpaid taxes is also a federal question. *United States* v. *Acri*, 348 U.S. 211.

The Government's main contention is that the assignments to Crest cannot be pledges within the meaning of section 6323(a) because Crest did not have possession of the assigned accounts. The Government argues, in order to have an effective pledge under the common law and section 6323(a), the contract to pledge must be accompanied by a transfer of possession or control over the property or collateral pledged as security.

The Government concedes that a chose in action can be the subject of an effective pledge, but argues that although the property is incapable of actual delivery to the pledgee, this does not dispense with the requirement of transfer of possession. In such a case, it argues, the pledgee must have possession and control over the documents which represent the property.

Crest argues that it had done everything necessary to perfect the assignment under the Illinois statutes. In addition, the contract between the parties clearly indicates that a pledgor-pledgee relationship was intended. The contract included a "Schedule of Assigned Accounts" which listed the specific accounts that were to be collateral for the loans. Standard knew that the accounts were assigned. It made payments directly to Crest. The only thing that was not done, and which the Government contends made all the other actions futile, was the transfer of the pieces of paper that represented the accounts.

It is well established that under the common law, a transfer of possession is an essential part of a valid pledge. 72 C.J.S. Pledges §§ 19, 20. The Illinois Supreme Court has held that certain agreements which purported to sell and assign accounts receivable outright were, in fact, security transactions and the transfers were pledges. *Dorothy* v. *Commonwealth Commercial Company,* 278 Ill. 629, 116 N.E. 143; *Mercantile Trust Company of Illinois* v. *Kastor,* 273 Ill. 332, 112 N.E. 988. However, under Illinois law, an assignment of accounts may be different than a pledge. *Immel* v. *Travelers Insurance Company,* 373 Ill. 256, 26 N.E. 2d 114. The fact that the Illinois statute, Ill. Rev. Stat. 1959, ch. 121½, § 220(c) provides that an assignment includes a pledge, does not mean that every assignment is also a pledge.

It is not necessary for us to decide whether the assignments here under examination were pledges under section 6323(a). However, we are required under United States Supreme Court decisions to hold that Crest's liens were not perfected, or, in the language of the Court, "choate."

In *United States* v. *City of New Britain,* 347 U.S. 81, 84, the Court stated: "On the other hand, the federal statutes do not attempt to give priority in all cases to liens created under the paramount authority of the United States." Yet, in more recent cases, mostly in *per curiam* opinions,

the Supreme Court seems to have imposed a standard of choateness that few competing non-federal liens can achieve, short of judgment.

The *New Britain* case involved municipal liens for real property taxes and water rents. The Court ruled section 6321 of the Internal Revenue Code, 26 U.S.C. § 6321, under which the federal lien was created, "does not in terms confer priority," and that the controlling principle is "first in time is the first in right." The Court said the priority of competing liens depends on when they "attached to the property in question and became choate."

The Supreme Court decision which controls this case is *United States v. R. F. Ball Construction Co.*, 355 U.S. 587. It is to be regretted that in deciding a question that would, necessarily, often be considered by the bench and bar, the reasons given by the majority for its decision were confined to less than three lines. The language used was: "The instrument involved being inchoate and unperfected, the provisions of § 3672(a), Revenue Act of 1939, 53 Stat. 449, as amended, 53 Stat. 882, 56 Stat. 957, do not apply." Fortunately, the four Justices who dissented give us some insight as to the basis of the majority opinion.

In the *Ball* case, a bonding company claimed priority under an assignment given as security for payment of a contingent indebtedness which did not arise until after the filing of the notice of the federal tax lien. The bonding company contended its lien was within the privileged categories of mortgagee or pledgee under section 3672(a) (now § 6323(a)). The District Court agreed with the bonding company that its assignment as collateral security was a perfected contractual lien and, therefore, entitled to priority over the federal tax lien. The Court of Appeals affirmed, but the Supreme Court reversed in the five to four decision hereinbefore described.

It is true that the *New Britain* case involved a statutory lien, but that fact is no ground for distinction, as in the *Ball* case the Court has imposed the same rigid standards in a case involving contractual liens.

In *United States* v. *Chapman*, 10 Cir., 281 F. 2d 862, the taxpayer contracted to do construction work in Oklahoma. To secure payment of loans, the taxpayer assigned his contract to a finance company. Subsequent to the assignment, the Government perfected tax liens against the property of the taxpayer. In an interpleader action to determine the distribution of a sum owing under the construction contract, the Court relied on the *Ball* case, and held that the finance company's lien was inchoate and unperfected. The finance company attempted to distinguish the *Ball* case on the ground that *Ball* involved an assignment to secure a future or contingent indebtedness, whereas the assignment here was to secure a present and existing debt. The Court cited with approval *First State Bank of Medford* v. *United States* (D.C. Minn.) 166 F. Supp. 204, and held that this distinction does not perfect an unperfected lien.

The *amicus curiae* attempted to distinguish the *Chapman* case on the ground that under Oklahoma law the assignment of the contract had to be recorded to be effective against third parties. However, there is nothing in the Court's opinion to indicate that its decision was based on the Oklahoma statute.

In the *Bank of Medford* case, *supra*, the bank loaned money to the taxpayer on the strength of a purported oral assignment by the taxpayer to the bank of money due from a contractor. The contractor was notified and had no objections to the assignment, and thereafter made payments to the bank. Subsequently, in 1954, the Government perfected tax liens against the property of the taxpayer. The bank did not realize until 1955 that the taxpayer was

in financial difficulty, and then reduced its notes to judgment. The Court said the issue was whether the bank came within any of the classes set out in section 6323(a). The Court, relying primarily on the *Ball* case, held the bank's lien was inchoate and unperfected.

Again, the *amicus curiae* attempted to distinguish this case on the ground that the Minnesota statute required a "written" assignment. However, the Court said that the assignment was not invalid under the statute (page 207) and based its decision on federal law (pages 209-10).

In *Arthur Company* v. *Chicago Paints, Inc.*, (D.C. Minn.) 175 F. Supp. 50, the taxpayer had a contract to paint certain structures. At the time of the suit, $9,000 was due the taxpayer under the contract. The bank had been financing the taxpayer and taking assignments of accounts receivable as security for an open line of credit. The debtor was notified the account had been assigned. The federal lien was perfected after the account in question, representing the $9,000, was assigned to the bank. The Court, again relying on the *Ball* case, held that the bank's lien failed to meet the test for preference over a federal tax lien.

In view of the decision in *United States* v. *R. F. Ball Construction Co., supra*, and the three additional cases decided after the *Ball* decision, we hold Crest's lien was not superior or prior to the lien of the United States. We must and do hold that Crest's lien was not choate and perfected as those terms have been defined by the Supreme Court.

We accept the concession of the Government that Road Machinery and Peter Kiewit, who are holders of mechanics' liens, are prior and superior to the liens of the United States.

The judgment of the District Court is

AFFIRMED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

Tuesday, May 16, 1961

Before

Hon. F. Ryan Duffy, Circuit Judge
Hon. Win G. Knoch, Circuit Judge
Hon. Latham Castle, Circuit Judge

No. 13226

United States of America, *Plaintiff in Intervention-Appellee,*

v.

Crest Finance Co., Inc., *Defendant-Appellant.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this case appealed from be, and the same is hereby, Affirmed, in accordance with the opinion of this Court filed this day.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

Thursday, June 15, 1961

Before

Hon. F. RYAN DUFFY, Circuit Judge
Hon. WIN G. KNOCH, Circuit Judge
Hon. LATHAM CASTLE, Circuit Judge

No. 13226

UNITED STATES OF AMERICA, *Plaintiff in Intervention-Appellee,*

v.

CREST FINANCE CO., INC., *Defendant-Appellant.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

IT IS ORDERED by the Court that the petition for rehearing of this cause be and the same is hereby, DENIED.

APPENDIX B

Statutes and Regulations

Internal Revenue Code of 1954:

Sec. 6321. Lien for Taxes.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount, (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U.S.C. 1958 ed., Sec. 6321.)

Sec. 6322. **Period of Lien.**

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time.

(26 U.S.C. 1958 ed., Sec. 6322.)

Sec. 6323. Validity Against Mortgagees, Pledgees, Purchasers, and Judgment Creditors.

(a) *Invalidity of Lien Without Notice.*—Except as otherwise provided in subsection (c), the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate—

* * *

(26 U.S.C. 1958 ed., Sec. 6323.)

Treasury Regulations § 301.6323-1(a)(2)(ii):

The determination whether a person is a mortgagee, pledgee, purchaser, or judgment creditor, entitled to the protection of section 6323(a), shall be made by reference to the realities and the facts in a given case rather than to the technical form or terminology used to designate such person. Thus, a person, who is in fact and in law a mortgagee, pledgee, or purchaser will be entitled as such to the protection of section 6323(a) even though such person is otherwise designated under the law of a State, such as the Uniform Commercial Code.

(26 C.F.R. § 301.6323-1(a)(2)(ii).)

Illinois Revised Statutes, Chapter 110:

Sec. 22. *Who may be plaintiff—Assignments—Subrogation.*

(1) The assignee and owner of a non-negotiable chose in action may sue thereon in his own name. He shall in his pleading on oath allege that he is the actual bona fide owner thereof, and set forth how and when he acquired title. The action is subject to any defense or set-off existing before notice of the assignment.

• • •

(Act of July 19, 1955, Laws 1955, p. 2238, sec. 22(1).)

Illinois Revised Statutes, Chapter 121 ½:

Sec. 220. *Definitions.*

As used in this Act unless the context requires otherwise,

(a) The term "acount receivable" or "account" means and includes any open, running or book account which arises out of or is acquired in connection with a business or occupation of the assignor and which is not represented by a judgment, or by a negotiable instrument or other writing the surrender of which is required by the obligor's contract with the assignor for the enforcement thereof. It includes sums due or to become due and accounts to arise under an existing contract, whether performed or unperformed. It also includes the proceeds and avails of any such account and all rights, powers, remedies, liens, collateral, security and incidents appertaining to such account, and all of the assignor's rights, title and interest in or to, or liens on, the merchandise or other property, if any, the sale or other transfer of which to the obligor gave rise to such account, in case such merchandise or prop-

erty be not delivered to or accepted by, or be rejected or returned by or repossessed from, the obligor.

(b) The term "obligor" means a person who owes or will owe the account.

(c) The term "assignment" means and includes any sale, pledge, conveyance or transfer of an account, or of any right, title or interest therein.

(d) The term "assignor" means the person who, being the owner of an account, makes an assignment thereof, and the term "assignee" means the person to whom such assignment is made.

(e) The term "person" means an individual, partnership, association, or foreign or domestic corporation.

The singular of any of the above terms shall include the plural thereof.

(Act of July 22, 1943, Laws 1943, vol. 1, p. 947, sec. 1.)

Sec. 221. *Validity of assignments—Payments by obligor.*

Every assignment of an account receivable heretofore or hereafter made in writing for valuable consideration shall be valid and shall be deemed and held to have been fully perfected at the time such assignment was or is made, notwithstanding that the obligor be not notified of or does not assent to such assignment; and thereafter no subsequent assignee, pledgee, purchaser or transferee of such account or other person claiming or to claim under, through or against the assignor, and no existing or future attaching, garnishing, judgment, execution, levying or other creditor of the assignor, except a creditor who through judicial proceedings shall have perfected a superior lien on such account prior to the time of such assignment, shall or

can have or be entitled to any right, title, lien or interest in or to such account superior to or in diminution of that of such assignee therein or thereto; and in case more than one assignment of the same account or any interest therein is made by the assignor, the one prior in time shall prevail over each subsequent one, notwithstanding that such subsequent assignee shall have notified the obligor of his claim thereto.

In any case where the obligor, not knowing or not being notified of such assignment and acting in good faith, makes payment of such account in whole or in part to the assignor, or to a subsequent purchaser or transferee of such account who shall have notified the obligor of such purchase or transfer to such subsequent purchaser or transferee, then the obligor shall to the extent of such payment be exonerated of liability to make payment to the first assignee of the account, but the person to whom such payment is made shall be accountable and liable to the assignee for such sums received by him.

(Act of July 22, 1943, Laws 1943, vol. 1, p. 947, sec. 2.)

APPENDIX C

Legislative History

HOUSE OF REPRESENTATIVES

(62d Congress, 2d Session.) (Report No. 1018.)

LIEN FOR TAXES

July 17, 1912.—Referred to the House Calendar and ordered to be printed.

Mr. Sterling, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H. R. 25780.]

The Committee on the Judiciary, to whom was referred the bill (H. R. 25780) to amend section 3186 of the Revised Statutes of the United States, report the same to the House with a recommendation that it do pass.

Section 3186 of the Revised Statutes is as follows:

> Sec. 3186. If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount shall be a lien in favor of the United States from the time it was due until paid, with the interest, penalties, and costs that may accrue in addition thereto upon all property and rights to property belonging to such person.

This section makes any delinquent tax due the United States a lien on all the property of the person delinquent in the payment of the tax, wherever it may be situated within the United States. A person proposing to buy the property of another could protect himself against such a

lien only by ascertaining from all the collectors in the United States whether or not the vendor was delinquent in the payment of taxes. This would be a great hardship and would make it practically impossible for any person proposing to buy property to secure himself against such liens. The same hardship would devolve upon mortgagees and judgment creditors. It is proposed to amend the section by adding the following:

> *Provided, however*, That such lien shall not be valid as against any mortgagee, purchaser, or judgment creditor until notice of such lien shall be filed by the collector in the office of the registrar or recorder of deeds of the county or counties, or parish or parishes in the State of Louisiana, within which the property subject to such lien is situated: *Provided further*, That the provision herein relating to the filing of notice shall be applicable whenever, and only whenever, the laws of the State wherein the property is situated shall authorize the filing of such notice in the office of the registrar or recorder of deeds as provided herein.

The amendment becomes effective in any State only when the legislature of that State authorizes the filing of notice of such lien by the collector in the office of the registrar or recorder of deeds of the county or parish where the property is situated.

It provides a very simple means of giving this notice that would not at all be burdensome upon the Government.

In the case of the *United States* v. *Snyder* (149 U.S., 210) the Supreme Court held that the lien created by section 3186 is a valid and binding lien even against a bona fide purchaser or encumbrancer in good faith for value, without knowledge or notice of the existence of such a lien. The Federal statute makes no provision for giving notice, constructive or otherwise, of the lien created by said sec-

tion, and in the case above cited it was held that the recording acts of the several States have no force or effect as against the lien of the Government; and the lien is so comprehensive that it covers all the property and rights to property of the delinquent situated anywhere in the United States, and any person taking title to real estate is subjected to the impossible task of ascertaining whether any person, who has at any time owned the real estate in question, has been delinquent in the payment of the taxes referred to while the owner of the real estate in question. The business carried on under the internal-revenue law may be at a great distance from the property affected by this secret lien, but this will not relieve the property from the lien.

The recent act relating to excise tax by corporations makes it imperative that some legislation of this kind be enacted in order to protect the transfer of property, and to facilitate business transactions. There is no reason why the Government should not occupy the same position with reference to liens on property as does the individual.

It is believed that the States will very readily pass legislation authorizing the filing of notice in the office of the registrar or recorder of deeds, in order to protect its citizens in business transactions against liens which the citizens can not know of except at great cost of money and time. This law simply gives the States the opportunity to do so if it wishes to save its citizens from this unnecessary burden.

(83d Congress, 2d Session.) (Report No. 1622.)

SENATE

INTERNAL REVENUE CODE OF 1954

June 18, 1954—Ordered to be printed

MR. MILLIKIN, from the Committee on Finance, submitted the following

REPORT

[To accompany H. R. 8300]

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Section 6323. Validity against mortgagees, pledgees, purchasers, and judgment creditors

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This section corresponds to section 3672 of the 1939 Code. As under existing law, a person who is in fact a mortgagee, pledgee, purchaser, or judgment creditor will be entitled as such to the protection of this section irrespective of the designation applied to such person under State law, for example, in a State which has adopted the Uniform Commercial Code and which uses other terms to describe such persons.